

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHARANJIT SINGH,)	CASE NO. C06-0700-JLR
)	
Petitioner,)	
)	
v.)	REPORT AND RECOMMENDATION:
)	INDEFINITE DETENTION
ALBERTO GONZALES, et al.,)	
)	
Respondents.)	
_____)	

I. INTRODUCTION AND SUMMARY CONCLUSION

Petitioner is a native and citizen of India who is being detained by U.S. Immigration and Customs Enforcement (“ICE”) pursuant to a final order of removal that became final on May 29, 2003. On May 17, 2006, petitioner filed a Petition for Writ of Habeas Corpus pursuant to 8 U.S.C. § 2241, challenging the constitutional and statutory authority of ICE to detain him any further due to the unlikelihood of his removal from the United States in the reasonably foreseeable future. (Dkt. #3). Petitioner requests that he be released from custody pending his removal from the United States. Respondents argue that petitioner’s continued detention is authorized by Section 241(1)(C) of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1231(a)(1)(C),

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01 because petitioner's removal has been suspended and extended due to his "failure and refusal to
02 make timely application in good faith for travel or other documents necessary to his removal."
03 (Dkt. #11 at 2).

04 Having carefully reviewed the entire record, I recommend that petitioner's habeas petition
05 (Dkt. #3) be GRANTED and respondents' motion to dismiss (Dkt. #11) be DENIED.

06 II. BACKGROUND AND PROCEDURAL HISTORY

07 Petitioner Charanjit Singh is a native and citizen of India. (Dkt. #15 at L73, L58). On
08 April 30, 1991, he entered the United States at San Francisco International Airport and sought
09 asylum. (Dkt. #15 at R125). An Immigration Judge ("IJ") granted petitioner asylum on June 24,
10 1992, and petitioner adjusted his status to that of Lawful Permanent Resident ("LPR") on
11 November 5, 1993. (Dkt. #15 at L76-80).

12 Petitioner left the United States for Canada in 1997, where he applied for but was denied
13 refugee status, and resided there until 2002. (Dkt. #15 at L308). On December 13, 2002,
14 petitioner was detained by the former Immigration and Naturalization Service¹ ("INS") while
15 attempting to re-enter the United States at Sumas, Washington without a valid entry card. The
16 INS determined that petitioner had effectively abandoned his LPR status when he left the United
17 States for Canada and resided there for over five years.

18 The INS issued a Notice to Appear, placing petitioner in removal proceedings and charging
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20 ¹ Effective March 1, 2003, the Immigration and Naturalization Service ("INS") was
21 abolished pursuant to the Homeland Security Act of 2002, 116 Stat. 2135, Pub. L. 107-296,
22 *codified at* 6 U.S.C. § § 101, *et seq.*, and its immigration removal functions were transferred to
the United States Immigration and Customs Enforcement ("ICE"), which is part of the
Department of Homeland Security ("DHS").

petitioner with being subject to removal pursuant to INA § 212(a)(6)(C)(i) (relating to misrepresentation), and INA § 212(a)(7)(A)(i)(I) (relating to documentation requirements). (Dkt. #15 at L103). On February 3, 2003, an IJ found petitioner removable, ineligible for relief from removal, and ordered him removed to India. (Dkt. 315 at L242). Petitioner appealed the IJ's decision on February 24, 2003. On May 29, 2003, the Board of Immigration Appeals ("BIA") denied petitioner's appeal. (Dkt. #15 at L259-60). On June 30, 2003, petitioner timely filed an appeal with the Ninth Circuit Court of Appeals. (Dkt. #19, Ex. C). On March 11, 2004, the BIA reissued its decision sua sponte because the BIA's order dated May 29, 2003, had been returned as undeliverable by the United States Postal Service. (Dkt. #15 at R228-30). On August 2, 2004, petitioner filed a letter with the Ninth Circuit requesting a stay of removal. (Dkt. #19). On August 16, 2004, the Ninth Circuit denied petitioner's appeal, mooted his request for a stay of removal. (Dkt. #15 at L324-26).

A. Removal Efforts

Petitioner has been in ICE custody since December 13, 2002. (Dkt. #15 at L102-03). On August 6, 2003 and March 11, 2004, ICE issued a Form I-229(a) "Warning for Failure to Depart," advising petitioner of the consequences for failing to assist in obtaining travel documents necessary for his removal. (Dkt. #15 at R136, R140).

On January 21, 2005, petitioner was served with another Warning for Failure to Depart and a "Notice of Failure to Comply Pursuant to 8 CFR 241.4(g)," stating that he had failed to comply with his obligation to assist in obtaining travel documents, and that his removal period would be extended. (Dkt. #R149, R147).

On March 29, 2005, petitioner was served with another Warning for Failure to Depart.

01 (Dkt. #15 at R150). On March 30, 2005, ICE drafted a request for travel documents, but
02 petitioner refused to cooperate. (Dkt. #15 at R162-69, R176). On October 13, 2005, ICE issued
03 a second Notice of Failure to Comply, advising petitioner that he had failed to comply with his
04 obligation to assist in obtaining travel documents, and that his removal period would be extended.
05 (Dkt. #R181).

06 On November 13, 2005, petitioner stated on a Detainee Request Form that he wanted to
07 go home to India and wished to cooperate in obtaining travel documents. (Dkt. #15 at R183-86).
08 Petitioner's deportation officer responded that he would get the travel documents to him and that
09 his new 90-day removal period would begin on November 15, 2005. (Dkt. #15 at R255).

10 On January 17, 2006, petitioner's counsel contacted his deportation officer and asked if
11 there were any concerns regarding petitioner's cooperation, but ICE officers did not respond to
12 the inquiry. (Dkt. #19, Ex. A). On February 28, 2006, ICE issued another Warning for Failure
13 to Depart. (Dkt. #15 at R216). That same day, petitioner filled out a personal questionnaire (Dkt.
14 #15 at R244), and was provided an Indian passport application to complete. (Dkt. #15 at R217-
15 226). Petitioner's deportation officer noted that petitioner was in compliance with his obligations
16 to assist in his removal. (Dkt. #15 at R256). On March 1, 2006, petitioner completed a request
17 for an Indian passport, and ICE forwarded the request, along with other documents, to the Indian
18 Consulate in San Francisco, California. (Dkt. #15 at R242, R245, R256). On March 21, 2006,
19 another request for travel documents was sent to the Indian Embassy. *Id.* On May 8, 2006,
20 petitioner's deportation officer contacted ICE headquarters and was informed that it "could be
21 another 90 days before they get any information." *Id.*

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01 B. File Custody Review

02 On August 19, 2004, ICE conducted a Post Order Custody Review. (Dkt. #15 at R127-
03 133). The review stated that petitioner has refused to cooperate in obtaining travel documents,
04 and recommended that petitioner remain in ICE custody until he cooperates with obtaining travel
05 documents. (Dkt. #15 at R129). On September 29, 2005, ICE conducted a second Post Order
06 Custody Review. (Dkt. #15 at R173-79). The review stated that petitioner “remains steadfast in
07 his refusal to cooperate,” and recommended that petitioner remain in ICE custody until either a
08 travel document is issued or petitioner elects to cooperate, which would then begin the final
09 removal period. (Dkt. #15 at R173). On November 17, 2005, ICE issued a Notice to Alien of
10 File Custody Review, indicating that ICE would conduct another file review on February 15, 2006.
11 (Dkt. #15 at R188). The administrative record contains no further custody reviews.

12 III. DISCUSSION

13 The post-removal-detention statute, INA § 241(a), 8 U.S.C. § 1231(a), provides for the
14 mandatory detention of aliens awaiting removal from the United States for an initial period of three
15 months. This three months may be followed by an additional three months discretionary detention
16 during which detention remains presumptively valid. *Zadvydas v. Davis*, 533 U.S. 678, 121 S. Ct.
17 2491, 2505, 150 L. Ed. 2d 653 (2001).

18 In *Zadvydas*, the Supreme Court explained that after this six-month period, the alien is
19 eligible for conditional release upon demonstrating that there is “no significant likelihood of
20 removal in the reasonably foreseeable future.” *Id.* Nonetheless, the six month presumption “does
21 not mean that every alien not removed must be released after six months. To the contrary, an alien
22 may be held in confinement until it has been determined that there is no significant likelihood of

01 removal in the reasonably foreseeable future.” *Id.* The petitioner has the burden of coming
02 forward with “good reason to believe that there is no significant likelihood of removal in the
03 reasonably foreseeable future.” *Id.* Then the burden shifts to respondents to produce evidence
04 which could rebut petitioner’s showing. *Id.*

05 In this case, petitioner has been in ICE custody following a final order of removal since
06 May 29, 2003.² Thus, the 90-day removal period expired on or about August 29, 2003, and the
07 six-month presumptively reasonable removal period expired on or about November 29, 2003.
08 Respondents contend that petitioner’s continued detention is authorized by 8 U.S.C. §
09 1231(a)(1)(C) because petitioner’s removal has been suspended and extended due to his “failure
10 and refusal to make timely application in good faith for travel or other documents necessary to his
11 removal.” (Dkt. #11 at 2). Respondents assert that petitioner did not begin cooperating with ICE
12 officials until February 28, 2006, when he completed and signed his passport application. (Dkt.
13 #11 at 6, Dkt. #23). Respondents further contend that ICE has been successful in repatriating
14 Indian citizens, and that petitioner’s removal is likely in the reasonably foreseeable future. (Dkt.
15 #23 at 2).

16 Petitioner argues that extension of the removal period is *not* authorized by 8 U.S.C. §
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18 ² An order of removal becomes administratively final upon a determination by the BIA
19 affirming such order. INA § 101(47), 8 U.S.C. § 1101(47); 8 C.F.R. § 241.1(d). Although the
20 BIA reissued its decision on March 11, 2004, petitioner had already filed a petition for review of
21 the BIA’s original decision with the Ninth Circuit within the 30-day deadline required by 8 U.S.C.
22 § 1252(b)(1), vesting jurisdiction in the Ninth Circuit over the BIA’s May 29, 2003, decision.
See Roy v. Ashcroft, 389 F.3d 132, 136 (5th Cir. 2004). The Ninth Circuit dismissed petitioner’s
petition for review without ordering a stay of petitioner’s removal. Accordingly, petitioner’s order
of removal became administratively final and the 90-day removal period began on May 29, 2003.
See INA § 241(a)(1)(B), 8 U.S.C. § 1231(a)(1)(B).

1231(a)(1)(C) and that his extended detention pursuant to this provision violates his due process rights. (Dkt. # 18 at 7). Petitioner asserts that ICE failed to comply with its own regulations when it purported to extend petitioner's detention pursuant to 8 U.S.C. § 1231(a)(1)(C) without serving petitioner with a "Notice of Failure to Comply" before the expiration of the 90-day removal period. *See* 8 C.F.R. § 241.4(g)(1)(ii). Petitioner further argues that his detention is unlawful because there is no reasonable likelihood that he will be removed in the foreseeable future. (Dkt. #18 at 11-14).

Pursuant to INA § 241(a)(1)(C), "the removal period shall be extended . . . and the alien may remain in detention during such extended period if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal." 8 U.S.C. § 1231(a)(1)(C). The Ninth Circuit has interpreted Section 241(a)(1)(C) as authorizing continued detention of a removable alien "so long as the alien fails to cooperate fully and honestly with officials to obtain travel documents." *Lema v. I.N.S.*, 341 F.3d 853, 857 (9th Cir. 2003)(emphasis added); *see also Pelich v. I.N.S.*, 329 F.3d 1057, 1060 (9th Cir. 2003)(holding that *Zadvydas* does not apply where an alien holds the "'keys [to his freedom] in his pocket' and could likely effectuate his removal by providing the information requested by the INS."). Section 241(a)(1)(C) is implemented by regulation found at 8 C.F.R. § 241.4(g), which provides that the removal period "shall be extended until the alien demonstrates to the Service that he or she has complied with the statutory obligations. Once the alien has complied with his or her obligations under the law, the Service shall have a reasonable period of time in order to effectuate the alien's removal." 8 C.F.R. § 241.4(g)(1)(ii)(emphasis added). The regulation further provides that ICE shall serve the alien

01 with a Notice of Failure to Comply before the expiration of the removal period, which will advise
02 the alien of the following:

03 (1) the provisions of INA § 241(a)(1)(C) (extension of removal period) and 243(a)
04 (criminal penalties related to removal);

05 (2) the circumstances demonstrating his or her failure to comply with the requirements
06 of INA § 241(a)(1)(C); and

07 (3) an explanation of the steps that the alien must take in order to comply with the
08 statutory requirements.

08 8 C.F.R. § 241.4(g)(5)(ii).

09 Here, ICE failed to comply with its own regulations when it purported to extend
10 petitioner's detention pursuant to INA § 241(a)(1)(C) without issuing a Notice of Failure to
11 Comply within the 90-day removal period, indicating that petitioner is not in compliance and what
12 steps he must take to be in compliance. Rather, respondents did not issue a Notice of Failure to
13 Comply until January 21, 2005 – seventeen months after the 90-day removal period expired.
14 Although respondents issued a Warning for Failure to Depart in August 2003, the warning is
15 merely a form given to every detainee and provides no indication that petitioner has failed to
16 cooperate or that the removal period has been extended. (Dkt. #15 at R136). According to the
17 Code of Federal Regulations, Notice of Failure to Comply and extension of the removal period
18 must be provided before the removal period expires. 8 C.F.R. § 241.4(g)(1)(ii)(requiring that ICE
19 provide notice of failure to comply “before the expiration of the removal period”); see also 8
20 C.F.R. § 241.4(g)(1)(iii)(providing that ICE shall advise the alien that the notice of failure to
21 comply shall extend the removal period, “if the removal period has not yet expired.”).
22 Consequently, ICE cannot rely on Section 241(a)(1)(C) to extend the removal period that expired

seventeen months earlier. Furthermore, although petitioner initially refused to cooperate, the administrative record indicates that petitioner began cooperating in November 2005. Accordingly, ICE's claim that petitioner has failed to cooperate is now moot. *See Lema*, 341 F.3d at 857; *see also* 8 C.F.R. § 241.4(g)(1)(ii).

Alternatively, respondents contend that petitioner's continued detention is lawful because petitioner's repatriation to India will occur in the reasonably foreseeable future. (Dkt. #23 at 2). Respondents assert that ICE has been successful in repatriating Indian citizens and that ICE has done all it can to obtain travel documents from India. *Id.* Petitioner challenges respondents' claim that he will be removed in the reasonably foreseeable future, contending that two travel document requests have been sent to the Indian Embassy, and the only feedback ICE has received regarding the travel documents is a May 8, 2006, statement that it "[c]ould be another 90 days before [ICE] get[s] any information." (Dkt. #15 at R256).

The Court finds that petitioner has met the *Zadvydas* standard of showing that there is no significant likelihood he will be removed in the reasonably foreseeable future. Petitioner has fully cooperated with ICE's efforts to obtain a travel document for him since November 2005. ICE, however, has provided no substantive indication regarding how or when it expects to obtain the necessary travel document from the Indian government. Rather, ICE merely asserts that it has followed up on its request for travel documents from India and done all it can. (Dkt. #23 at 2). This is not sufficient evidence to rebut petitioner's showing that he is unlikely to be removed in the reasonably foreseeable future.

Accordingly, the Court finds that petitioner has shown that there is no significant likelihood of his removal to India in the reasonably foreseeable future. The six-month period established by

01 the Supreme Court in *Zadvydas* expired on November 29, 2003, and petitioner should be released.

02 IV. CONCLUSION

03 For the foregoing reasons, I recommend that the Court GRANT petitioner's habeas
04 petition and order petitioner's release on conditions. Such conditions may include those set forth
05 in 8 C.F.R. § 241.5(a). A proposed Order accompanies this Report and Recommendation.

06 The Clerk is directed to also send a copy of this Order to the Honorable James L. Robart.

07 DATED this 17th day of August, 2006.

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09 Mary Alice Theiler
10 United States Magistrate Judge
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